No. 81-1615

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1981

IN THE MATTER OF JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant,

vs.

JOHNS-MANVILLE CORPORATION, et al.,

Appellees.

On Appeal from the
New York Court of Appeals

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Is the New York Court of Appeals judgment sustainable on an adequate independent state ground?

2. Does the New York Court of Appeals holding that appellant's causes of action accrued and the statutes of limitations commenced on the last date of employment-related exposure to asbestos deprive appellant of due process of law?

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MOTION TO DISMISS

Pursuant to Rule 16.1 (b) of the Rules of the Supreme Court of the United States, appellee Fibreboard Paper Products Corporation* moves to dismiss the appeal taken from a judgment of the State of New York Court of Appeals, on the grounds that the judgment is sustainable on an adequate independent non-federal basis and that the appeal does not present a substantial federal question.

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*Statement pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States:

Fibreboard Paper Products Corporation is a wholly owned subsidiary of Louisiana-Pacific Corporation. Fibreboard Paper Products Corporation has no subsidiaries.

STATEMENT OF THE CASE

In August, 1975 James McKee, Jr. commenced suit against fourteen major manufacturers, suppliers and distributors of asbestos-containing insulation materials alleging theories of negligence and strict products liability and seeking to recover for alleged asbestos related injuries. Mr. McKee, who had worked with asbestos insulation from 1939 to 1972, was last exposed to asbestos during employment in 1970, four and one-half years prior to commencement of this suit.

The New York Court of Appeals affirmed the dismissal of appellant's causes of action as barred by the three year statute of limitations applicable to actions to recover for personal injury contained in the New York Civil Practice Law and Rules §214(5), and declined appellant's invitation to change New York's accrual rule such that McKee's cause of action would accrue on the date of discovery of the asbestos disease rather than on the date of last exposure to the invading substance. The Court reiterated New York law that causes of action for personal injury accrue at the time of invasion of a claimant's body and noted that extension of New York's limited "date of discovery" provision, contained in the New York Civil Practice Law and Rules §214-a, and applicable to medical malpractice and foreign object cases, was a matter best reserved for the legislature. *Steinhardt v. Johns-Manville Corp., et al.*, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, ____ N.E.2d ____ (1981). (Printed in appellant's Jurisdictional Statement at Appendix, A-1).

SUMMARY OF ARGUMENT

1. Even if appellant's causes of action for alleged asbestos related diseases were deemed to accrue upon date of discovery of the diseases, appellant's suit would be barred by New York's two year statute of limitations applicable to claims accruing upon discovery. The Judgment of the New York Court of Appeals thus rests on adequate independent non-federal grounds.

2. The longstanding New York rule that accrual occurs upon the date exposure is supported by a rational basis and does not present a substantial federal question.

ARGUMENT

POINT I

The judgment of the Court of Appeals rests on adequate independent state grounds and the appeal seeks an advisory opinion.

The New York Court of Appeals held that appellant's cause of action, commenced in August, 1975, accrued in 1970 on the date of appellant's last work related exposure to asbestos and was time barred by New York's three-year statute of limitations for suits alleging personal injuries. It is undisputed that Mr. McKee discovered his disease, at the latest, on April 3, 1973.

New York Civil Practice Law and Rules Section 203(f) provides, in pertinent part, that "where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered . . . the action must be commenced within two years after such actual or imputed discovery. . .". Accordingly, even if the Supreme Court were to require New York to apply a date of discovery rule to appellant's suit, CPLR 203(f) would be the applicable statute of limitations (*Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945)), and would operate to bar his claims. That section sets forth the judgment of the New York Legislature concerning statutes of limitations applicable to claims deemed to accrue on the date of discovery and there can be no real question that such two year statute of limitations passes constitutional muster. *See Canadian No. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920); *Wilson v. Iseminger*, 185 U.S. 55, 62 (1901); *Wheeler v. Jackson*, 137 U.S. 245, 255 (1890).

Should the judgment of the New York Court of Appeals with respect to accrual of appellant's suit be found constitutionally defective and a date of discovery rule deemed constitutionally

mandated, appellant's causes of action would be governed by CPLR §213(f) and would still be time-barred. The judgment of the Court of Appeals thus rests on adequate independent state grounds, and the Court is, in effect, being asked to render an advisory opinion having no practical effect on appellant's case. Inasmuch as a decision by this Court on the merits "cannot affect the rights of the litigants in the case before it," *St. Pierre v. United States*, 319 U.S. 41, 42 (1940), the appeal is for all practical purposes moot and the Court should refuse appellant's invitation to render an advisory opinion. *Herb v. Pitcarin*, 324 U.S. 117 (1945).

POINT II

The appeal does not present a substantial federal question.

The New York rule that accrual of negligence and strict products liability causes of action occurs at the time of injury is clear and longstanding. In *Schmidt v. Merchants Despatch Trans. Co.*, 270 N.Y. 287 (1936), the New York Court of Appeals held that a cause of action asserting a claim for lung damage allegedly caused by inhalation of dust while in the defendant's employ accrued when the plaintiff inhaled the foreign substance rather than when he discovered the disease. Similarly, in *Schwartz v. Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, *remittitur amended* 12 N.Y.2d 1073, *cert. den.* 374 U.S. 808 (1963), the plaintiff alleged that a compound inserted into his sinuses during an x-ray procedure caused him to contract cancer many years later. The Court held that his claim accrued at the time of the invasion of plaintiff's body and not at the time of the manifestation of the cancer. Finally, in *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780 (1979) the New York Court of Appeals held that causes of action alleging damages for a cancer allegedly caused by a drug injected into the paintiff's body twenty years before accrued at the time of invasion of the

plaintiff's body. *See also Reis v. Pfizer, Inc.*, 48 N.Y.2d 664 (1979). As it did in the instant case, the Court of Appeals in *Thornton* expressly declined to extend judicially the New York discovery rule, embodied in CPLR 214-a and applicable to medical malpractice, and noted that "[s]uch matter is best reserved for the Legislature, and not the courts." *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781-782, *supra*.

Matters relating to statutes of limitations have traditionally been left to the states and to the legislative process. *Jackson ex dem. Hart v. Lamphire*, 28 U.S. (3 Pet.) 280 (1830). They are "found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). The Supreme Court has long recognized that it is within the sovereign power of each state to enact statutes of limitations, *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, (1831), and that "[t]hey have come into the law not through the judicial process but through legislation. They represent the public policy about the privilege to litigate." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). As early as 1830, in a case dealing with the validity of a state recording law, Justice Baldwin wrote:

> The time and manner of their operation, the exceptions to them, *and the acts from which the time limited shall begin to run*, will generally depend on the sound discretion of the legislature . . . (Emphasis supplied)

Jackson v. Lamphire, 28 U.S. (3 Pet.) 280, 290, *supra*. And as recently as 1979 this court has stated, with respect to statutes of limitations, "[w]e should give them effect in accordance with what we can ascertain the legislative intent to have been, [and if the legislative branch disagrees] it may exercise its prerogative to amend the statute so as to effect its legislative will." *United States v. Kubrick*, 444 U.S. 111, 125 (1979).

Where no fundamental right or suspect classification is involved, the requirements of due process are satisfied if the

legislation or interpretation bears a reasonable relation to a proper legislative purpose, *Nebbia v. New York*, 291 U.S. 502, 527 (1943), and if such reasonable relationship exists the courts will not inquire into the wisdom of the pronouncement *Dandridge v. Williams*, 397 U.S. 471 (1970). The right to bring suit is not a fundamental right guaranteed by the constitution, *San Antonio v. Rodriquez*, 411 U.S. 1 (1973), thus, access to the courts "may be denied if there is a rational basis therefore." *Montgomery v. Daniels*, 38 N.Y.2d 41, 60 (1975); *see also Ortwein v. Schwab*, 410 U.S. 656 (1973); *U.S. v. Kras*, 409 U.S. 434 (1973); *Clark v. Gulesian*, 429 F.2d 405 (1st Cir. 1970).

The New York accrual rule with respect to asbestos disease is based on sound and rational policy determinations. It is a recognition that the interests of an allegedly injured plaintiff are eventually outweighed by the interests in prohibiting stale claims whose defense is prejudiced by the loss of evidence, lack of records, death of witnesses and impaired accuracy of the fact-finding process. *See Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478 (1980); *United States v. Kubrick*, 444 U.S. 111, *supra.; Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Order of Railway Telegraphers v. Railway Express Agency*, 321 U.S. 342, 249 (1944).

Finally, with respect to questions such as accrual of asbestosis related claims, the legislature, rather than the courts is in a better position to inquire into the causes and incidence of the alleged hardship and to balance the result of such inquiry against considerations of policy and the question of how society should best respond. *See Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 219, *remittitur amended* 12 N.Y.2d 1073, *cert. denied* 374 U.S. 808, *supra*.

Statutes of limitation "are by definition arbitrary, and their operation does not discriminate between the just and the unjust

claim, or the voidable and unavoidable delay." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). The Supreme Court has recently noted that "[i]t goes without saying that statutes of limitation often make it impossible to enforce what were otherwise perfectly valid claims." (*United States v. Kubrick*, 444 U.S. 111, 125, *supra*, and statutes of limitations have been held constitutionally valid which in some instances extinguish a right of action even before injury occurs, *Agus v. Future Chattanooga Development Corp.*, 358 F.Supp. 246 (E.D. Tenn. 1973); *Hargraves v. Brackett Stripping Machine Co.*, 317 F.Supp. 676 (E.D. Tenn. 1970). Other states such as Alabama and Virginia, follow the New York rule that the cause of action accrues at the time of exposure to or ingestion of the product. *Garrett v. Raytheon Co., Inc.*, 368 So.2d 516 (1979); *Street v. Consumers Mining Corp.*, 39 S.E.2d 271 (1946). In a related area, several states have by statute limited the time within which a products liability claim can be made. *See* Connecticut General Statutes Ann., Section 52-577(a); Florida Statutes Ann., Sections 95.031(2), 95.11(3); Utah Code Ann., Section 78-15-1 to 6.

Finally, appellant's repeated citation to *Urie v. Thompson*, 337 U.S. 163 (1949), as authority for broadranging constitutional requirements for statutes of limitations is erroneous. In *Urie* the Court was concerned solely with the federal statute of limitations applicable to the Federal Employers' Liability Act, *DeWitt v. United States*. 593 F.2d 276 (7th Cir. 1979), which was intended by Congress to be remedial legislation aimed at specific problems in the railroad industry. *Eggert v. Norfolk and W. Ry. Co.*, 538 F.2d 509, 511 (2nd Cir. 1976). In *Urie* the Court was concerned with discovering the intent of Congress in enacting specific legislation and was not concerned with constitutional issues. Indeed, *Urie* involved no constitutional questions at all, and its holding applies only to the Federal Employers' Liability Act.

Appellants' remaining reasons for asserting that the federal question is substantial concern the alleged number of people involved and the fact that authorities in New York as well as the national bench and bar have discussed the problems. All of these reasons, however, argue more strongly for a legislative, rather than a judicial resolution of the problem.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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